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IN THE

Supreme Court of the United States

OCTOBER TERM 1967

No.

EPHRAIM FREIGHTWAYS, INC., Petitioner,

v.

RED BALL MOTOR FREIGHT, INC., Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in the above entitled case on April 17, 1967.

CITATIONS TO OPINIONS BELOW

The opinion and order of the District Court (R. 85) is unreported and is printed in the Appendix hereto, *infra*, p. 15. The opinion and order of the Court of Appeals is reported in 376 F.2d 40 and is printed in the Appendix hereto, *infra*, p. 16.

JURISDICTION

The judgment of the Court of Appeals was entered on April 17, 1967. Ct. App. R. 4; Appendix, *infra*, p. 16. The jurisdiction of this Court is invoked under 28 U.S.C., § 1254(1).

QUESTION PRESENTED

The District Court denied defendant's motion to stay all further proceedings below. The purpose of the stay was to defer the action until final determination of an administrative proceeding before the Public Utilities Commission of the State of Colorado in which defendant has intervened because the basic issues before both the Commission and the District Court are contended to be the same. Both injunctive relief and damages are sought by plaintiff below. The question presented is:

> Is the denial of the stay appealable as an interlocutory order refusing an injunction?

STATUTE INVOLVED

The Statute involved is 28 U.S.C., § 1292 (a) (1). It permits appeals to the courts of appeal from interlocutory orders of the district courts refusing injunctions. The statute is set out in the Appendix, *infra*, p. 12.

STATEMENT OF THE CASE

Plaintiff, Red Ball Motor Freight, Inc., brought action against defendant, Ephraim Freightways, Inc., for both an injunction and for damages. The District Court below acquired jurisdiction under 28 U.S.C. § 1332. (R. 77, 86) The complaint is based upon governing Colorado law. (R. 1, 87) Plaintiff is a common carrier of property by motor vehicle, holding a certificate of public convenience and necessity from the Public Utilities Commission of the State of Colorado. (R. 1, 87, 89) Defendant is a private (contract) carrier of property by motor vehicle holding a permit from the Public Utilities Commission of the State

of Colorado. (R. 6, 87, 89) Plaintiff's contention is that defendant has unlawfully operated as a common carrier of property in competition with plaintiff. (R. 1, 87) Defendant denies that it has engaged in unlawful operations either as a common carrier or as a private carrier. (R. 43, 88)

Various preliminary motions were filed by plaintiff and defendant. (R. 16, 17, 18, 19, 20, 25, 30, 32, 82) Orders of the court were entered accordingly. (R. 36, 38, 39, 85) Certain pre-trial discovery proceedings were conducted by plaintiff. (See R. 14, 25, 34 and other entries, appearing on certified copy of docket entries, dated 9-22-65, 10-4-65, 1-18-66, 4-13-66, 5-5-66 at Ct. App. R. 1B). Motions for intervention were filed by Contract Carriers' Conference of Colorado Motor Carriers Association and others (R. 50, 55) and by Miller Brothers, Inc. (R. 60, 63) Both said motions to intervene were denied. (R. 71) The court has now entered an amended pre-trial order. (R. 86)

After the denials of the motions to intervene and before the entry of the pre-trial order, defendant filed its motion to stay all proceedings in the within matter. (R. 74-A) Defendant requested the stay until final determination of a complaint case pending before the Public Utilities Commission of the State of Colorado, entitled *Denver Laramie Walden Truck Line, Inc., et al. vs. Miller Brothers, Inc.*, being docketed as Case No. 5314 (hereinafter referred to as *"Miller"*). (A copy of the formal complaint before the Commission is attached as Exhibit "A" to defendant's motion to stay. R. 74-D.) Said motion set forth (1) the issues contained in *Miller* which are deemed pertinent herein; (2) the commission staff's statement that the *Miller* issues are "extraordinarily significant"; (3) that the determination of those issues will be binding upon your petitioner as well as all other class A private carriers; (4) that the Public Utilities Commission, in *Miller*, will determine many of the issues involved in the instant case; and (5) that a conflict between a determination by the federal courts and by the Public Utilities Commission of the State of Colorado would place this carrier in an untenable posi-

tion of having two complete and separate rules that cannot be reconciled but must be followed. The motion was denied. (R. 83)

Appeal was duly prosecuted from the order of the District Court for the District of Colorado to the Court of Appeals for the Tenth Circuit in accordance with 28 U.S.C. § 1292(a). The opinion of the Court of Appeals was that the order of the District Court denying the stay was appealable as a denial of an interlocutory injunction only if the action in which the order was made is essentially an action at law and if the stay was sought to permit the prior determination of some related equitable matter. This action, the court held, is essentially equitable in nature even though in order to obtain complete relief an award of damages is also sought. The court further held that defendant sought the stay not to permit the prior determination of a related equitable matter, such as a defense or counterclaim, but rather for the purpose of deferring the action until the determination of an administrative proceeding before the Public Utilities Commission for the State of Colorado. Such an administrative proceeding, the court stated, is not a related equitable matter. Therefore the appeal was dismissed. Appendix, *infra*, p. 16.

REASONS FOR GRANTING THE WRIT

1. The statute makes appealable all "interlocutory orders . . . refusing . . . injunctions . . ." 28 U.S.C., § 1292(a). But is a stay order to be considered as an interlocutory injunction order? Mr. Justice Black with whom Mr. Justice Douglas concurred, has answered affirmatively, stating:

> "And this Court has held that § 1292 makes all stay orders appealable that have the substantial effect of interlocutory injunction orders. Ettelson vs. Metropolitan Life Insurance Co., 317 U.S. 188, 63 S. Ct. 163, 87 L.Ed. 176." *Baltimore Contractors, Inc. vs. Bodinger*, 348 U.S. 176, 181 (1955). (Dissenting opinion.)

The question next is whether the stay order has the

"substantial effect" of an interlocutory injunction order. This Court stated in simple terms long ago in *Shanferoke Coal & Supply Corporation vs. Westchester Service Corporation,* 293 U.S. 449, 55 S.Ct. 313 (1934) that the principle that makes the interlocutory order in this case an appealable refusal of an injunction is:

> "(T)he motion for a stay is an application for an interlocutory injunction. . . ."

The decision below conflicts with the broad liberal policy of that statute on its face and with the construction of that statute by this Court.

There is of course a recognized distinction between cases in which a stay is sought which amounts to an interlocutory injunction and cases in which a stay is sought to control the progress of the cause so as to maintain the orderly processes of justice. The court below had an apparently reasonable basis for ruling as it did based on certain language in the cases of *City of Morgantown vs. Royal Insurance Co., Ltd.,* 337 U.S. 254 (1949) and *Baltimore Contractors, Inc. vs. Bodinger,* 348 U.S. 176 (1955). However, the holdings, as distinguished from the opinions, in the *Morgantown* and *Bodinger* cases can be reconciled with the broad limits of the statute as originally construed by the *Shanferoke* case. The actual holdings in the *Morgantown* and *Bodinger* cases were that these cases were simply applications for stays to control the progress of the cause so as to maintain the orderly processes of justice and were not applications for "injunctions."

But we have not a matter of determining mere mode and sequence of trial here. This is not a case where a stay is sought in order that a jury trial may be held first or last as in *Morgantown.* Rather the order appealed from falls on the other side of the line and constitutes an injunction contemplated by the statute permitting an appeal.

It would appear that this case presents this Court with the opportunity to set forth once and for all the distinction between the cases cited above and to reconcile them

with the principle underlying all of them permitting appeals in proper cases under the statute.

2. Even if the opinions in the *Morgantown* and *Bodinger* cases, apart from the holdings in those cases, be considered, the fact situation in the case before this Court complies with the requirements of those opinions. Under the rule of those cases, the denial of defendant's motion for a stay is appealable only if the action is by its nature an action at law.

In order to determine whether a matter is essentially an action at law or whether it is essentially a suit in equity, the Court must determine what the gist of the action is. Where the action is essentially for money damages, which in common law would fall in a well recognized form of action such as an action of tort for damage to property or person, the case is an action at law even though there has been added an incidental prayer for equitable relief. In the instant action, the fact that over $350,000 has been demanded as damages, for depriving plaintiff of business, damage to its goodwill and franchise, and for penalty damages, it would appear that a substantial claim for damages had been made and that the matter is essentially an action at law. The fact that plaintiff also seeks an injunction to prevent further injury to it, is simply incidental to the action and does not make it an equitable action but rather it remains as an action at law. The within matter is at least an action at law coupled with an action in equity, and therefore is appealable.

3. It would appear that the court below is in error in determining that the stay order is only appealable if the purpose of the stay is to permit the prior determination of a related equitable matter. There is no such requirement appearing in the statute or the *Shanferoke* case. This element has never been stated by this Court to be necessary to an appeal under § 1292(a).

In principle, there would seem to be no good reason to require this additional road block to an appeal. A stay

order should be appealable where the prior determination of *any* related matter is sought whether equitable or otherwise. In this case there was and is a related matter pending before the Public Utilities Commission of the State of Colorado in which this defendant has intervened. It involves the same basic issues as are before the federal district court. We submit that the removal of this unnecessary road block against appeals would place the granting of appeals on a sound basis for this appellant and for others. Certainly Congress had good reasons for enacting the statute permitting interlocutory appeals. This purpose is being frustrated by the courts of appeal in their interposing as a requirement for appeals that the purpose of the stay order sought must be to permit the prior determination of a related *equitable* matter. E.g. *Jackson Brewing Co. vs. Clarke,* 303 F.2d 844 (5th Cir. 1962), cert. denied 371 U.S. 891; *Allied Air Freight, Inc. vs. Pan American World Airways, Inc.* 340 F.2d 160 (2d Cir. 1965), cert. denied 381 U.S. 924.

4. The sound and very pertinent remarks of Mr. Justice Black in his dissent in the *Bodinger* case are equally applicable here, and demonstrate the sound reasons for ruling that this is an appealable case:

> *"For two trials, one unnecessary, may take longer and cost more than two appeals where one would do.* Take this case for example. It must now go back for a court accounting trial which could be time-consuming and expensive to litigants and to the Government. And should petitioner lose on the merits it could undoubtedly appeal. On that review the first question for the appellate court would be whether the order denying arbitration, which the Court now refuses to consider, was right or wrong. If found wrong, the trial court's judgment on the merits would have to be vacated and the case again sent back for determination on the merits—this time by arbitration. In that event the trial the Court now orders will have been wholly futile — not even the litigant who now appears to be suc-

> cessful will have gained anything from it, unless perchance he stands to profit from delay. There is some difficulty, at least, in laying this wasteful procedure at the door of Congress." 348 U.S. at 186, 75 S.Ct. at 255. (Emphasis added.)

In line with Justice Black's reasoning, two trials in the within case, one unnecessary, may take longer and cost more than two appeals where one would do. If the dismissal of this appeal should stand, and this case is to be tried without reference to the *Miller* case now pending before the Public Utilities Commission of the State of Colorado and then after a trial — expensive and time-consuming to both the litigants and to the courts — upon subsequent appeal, if the court should find that this cause should have been stayed and that the *Miller* case should guide the court in the within matter, then a *retrial* of the within case after the conclusion of the *Miller* case would be the probable outcome. "In that event not even the litigant who now appears to be successful will have gained anything from it. . . ."

By refusing review, the court below has denied plaintiff the opportunity to have reviewed a question of grave importance to the people of the State of Colorado, and indeed to shippers and receivers of freight everywhere. Similar issues of similar concern are presented in the *Miller* case before the Public Utilities Commission of the State of Colorado. With reference to the latter case, the staff of the Public Utilities Commission entered its notice of participation and stated therein:

> "The issues contained in and basic to the above entitled action are extraordinarily significant to the regulation of motor carriers in the State of Colorado."

It is anticipated that the effect of the within matter, if plaintiff should prevail in its complaint for an injunction, or the effect of the *Miller* case if the complainants therein should prevail in obtaining an order revoking the authority of Miller Bros., would in either case, have a devastating

effect on the contract carriers within the State of Colorado. The common carrier plaintiff in the within matter seeks to enjoin the private carrier defendant herein from operation and would virtually put defendant out of business. The actions of the common carrier complainants in the *Miller* case against the contract carrier respondent therein seek to revoke the permit of *Miller*, and would thereby put that respondent out of business. But much more is at stake than Ephraim and Miller. The future of contract carriers throughout the state is in jeopardy, if either Ephraim or Miller should fall. The result will be the elimination of a majority of the services of the present class A private (contract) carriers by motor vehicle. This would eliminate approximately 50% of Colorado's intrastate for-hire motor freight system operating on regular schedules over regular routes. With many Colorado shippers and receivers of freight dependent very largely, and with others dependent wholly, upon motor freight transportation, the significance of this elimination is readily apparent and makes the matter before this Court one of grave importance.

Appellant believes that the basic issues of the *Miller* case are also inherent in the within case. Both cases must be decided in accordance with Colorado law. Orderly procedure would indicate that only one such matter should be determined at a time. The federal courts should not have to decide a case ahead of the state tribunal which is empowered to and which is about to determine the principles which will be controlling in this case.

The *Miller* case will be controlling because the pronouncement of the Public Utilities Commission is tantamount to and has the effect of a state statute unless and until it is set aside by the Colorado courts or legislature, and so is binding upon the federal courts. The law of Colorado can and should be interpreted by the Public Utilities Commission and the Colorado courts prior to determination by the federal courts. The Commission is much closer to the effect which this case or the *Miller* case will have upon the motor carriers industry within the state than are the

courts. Hence, the Commission should be allowed to exercise its judgment first, in order to prevent the courts from entering an order or orders which subsequently may prove to be a nullity. Thus the Court of Appeals should review the decision of the District Court refusing to stay proceedings before it until the *Miller* case can be decided.

The importance of the within matter is pointed up by the action of the Forty-sixth General Assembly of the State of Colorado which recently adjourned. That session enacted Senate Bill 208 (Appendix *infra* p. 12), which was the first major piece of legislation in a period of some thirty years concerning the motor carriers industry. It changed the philosophy of motor carriage for the transportation of freight from the principle of regulated monopoly to the principle of regulated competition.

This law was based largely upon the fact that the *Miller* case and the within case were before the Public Utilities Commission and the federal courts. The view of the legislature was that if private carriage is threatened then another system of carriage—namely additional common carriers—must be made available through the state so that the carriage of freight by motor vehicle may be uninterrupted and continued by competition among the carriers.

In addition, a joint resolution by the House and Senate of the Forty-sixth General Assembly, SJR 32 (Appendix, *infra* p. 13), set up a legislative study committee to study among other things the relationship between contract and common carriers by motor vehicle.

The concern of the legislature for this problem points up the significance of the case at hand.

A review of the stay order is sought so that orderly handling of the principles involved may take place; and because of the importance of this matter, the stay order should have been reviewed.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

Thomas F. Kilroy
Truman A. Stockton, Jr.
John H. Lewis
William F. Schenkein

Counsel for Petitioner

July 1967

APPENDIX

28 U.S.C. § 1292. Interlocutory decisions

(a) The courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court....

FORTY-SIXTH GENERAL ASSEMBLY
SENATE BILL NO. 208

A BILL FOR AN ACT

RELATING TO REGULATED COMPETITION AMONG MOTOR VEHICLE CARRIERS.

Be it enacted by the General Assembly of the State of Colorado:

SECTION 1. 115-9-5, Colorado Revised Statutes 1963, is amended to read:

115-9-5. *Rules for issuance.* (1) The commission shall have power, under such rules of procedure governing the application therefor as it may prescribe, to issue a certificate of public convenience and necessity to a motor vehicle carrier or to issue it for the partial exercise only of the privilege sought; and may attach to the exercise of the rights granted by said certificate such terms and conditions as, in its judgment, the public convenience and necessity may require.

(2) The granting of any certificate of public convenience and necessity to operate a motor vehicle for hire, for the transportation of property, shall not be deemed to be

an exclusive grant or monoply, and the doctrine of regulated competition shall prevail. The commission shall have authority to grant more than one certificate of public convenience and necessity to operate motor vehicles for the transportation of property, over and along the same route or a part thereof or within the same territory or a part thereof, if the commission finds that the present or future public convenience and necessity requires or will require such operation.

SECTION 2. *Safety clause.* The general assembly hereby finds, determines, and declares that this act is necessary for the immediate preservation of the public peace, health and safety.

Approved June 16, 1967

FORTY-SIXTH GENERAL ASSEMBLY
S.J.R. NO. 32

Be It Resolved by the Senate of the Forty-sixth General Assembly of the State of Colorado, the House of Representatives concurring herein:

1. That a committee composed of fifteen members be appointed for the conduct of a study herein set forth.

2. Five of the members of said committee shall be named by the Governor, and shall be leading businessmen selected from utilities and businesses which are regulated by the Public Utilities Commission of the State of Colorado. Such members shall represent as nearly as possible all utilities and businesses so regulated.

3. The remaining ten members of the committee shall be composed of five members from each house of the General Assembly, with three members from the majority party in each house, and two members from the minority party in each house.

4. *The committee shall conduct a study of the laws of the State of Colorado administered by and pertaining to the Public Utilities Commission of Colorado, the goals of which study shall be: To determine the adequacy of such laws; to consider the need for greater specificity in such laws; to recommend changes in such laws to improve the system of regulation and enforcement thereof;* to make recommendations concerning the method of selection and qualifications of members of the Public Utilities Commission.

5. *In making recommendations, the committee shall take into account the needs of the public; the industries regulated and the problems of each of them; and the necessity to treat reasonably those industries and segments thereof which have developed their conduct in reasonable reliance upon the laws as interpreted and administered by the commission.*

6. That the committee conduct its study during the year 1967, and report on the results thereof to the Second Regular Session of the Forty-sixth General Assembly.

7. That the staff of the Legislative Council shall assist the committee in its study, and all expenditures of the committee shall be approved by the chairmen of the Legislative Council, and be paid by vouchers and warrants drawn as provided by law from the appropriation made for interim studies of the Legislative Council; but no more than $2,000 shall be expended for such purposes.

8. That a copy of this resolution be transmitted to the Honorable John A. Love, Governor of the State of Colorado. (Emphasis added.)

Approved March 29, 1967

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Civil Action No. 9332

RED BALL MOTOR FREIGHT, INC.,
a corporation,

Plaintiff,

vs.

EPHRAIM FREIGHTWAYS, INC.,
a corporation,

Defendant.

ORDER

The plaintiff is the holder of a certificate of public convenience and necessity issued by the Public Utilities Commission of the State of Colorado to operate as a common carrier by motor vehicle. The defendant operates as a private carrier by motor vehicle under a Class A permit issued by the Public Utilities Commission of the State of Colorado. In essence, the complaint alleges that the defendant is engaged in operations not permitted by its permit and which encroach upon the lawful operations of the plaintiff, and the plaintiff seeks damages and an injunction.

The defendant has moved to stay further proceedings in this matter because there is now pending before the Public Utilities Commission a proceeding between parties who are strangers to this action, but in which the defendant believes many of the questions before the court in the instant case will be determined by the Public Utilities Commission of the State of Colorado. The stay is opposed by the plaintiff.

The court is of the opinion that this is not a proper case to invoke the doctrine of abstention and that this matter should not be stayed.

IT IS THEREFORE ORDERED that the motion to stay be and the same is hereby denied.

DATED at Denver, Colorado, this 20th day of July, 1966.

BY THE COURT:

HATFIELD CHILSON

Hatfield Chilson, Judge
United States District Court

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

NO. 9068

EPHRAIM FREIGHTWAYS, INC.,

Appellant,

vs.

RED BALL MOTOR FREIGHT, INC.,

Appellee.

April 17, 1967

Stockton, Lewis and Mitchell, Denver, Colorado, (Truman A. Stockton, Jr., John H. Lewis and William F. Schenkein, Denver, Colorado on the brief), for Appellant.

Edward T. Lyons, Jr., of Jones, Meiklejohn, Kehl & Lyons, Denver, Colorado, (T. Peter Craven, Denver, Colorado, with him on the brief), for Appellee.

Before PICKETT, BREITENSTEIN and HICKEY, Circuit Judges.

PICKETT, Circuit Judge.

This is an appeal from an order of the United States District Court for the District of Colorado denying a motion to stay all proceedings pending determination by the Colorado Public Utilities Commission of another case said to be determinative herein.

Red Ball Motor Freight, Inc. brought a diversity action against Ephraim Freightways, Inc. for an injunction and damages. Red Ball is a common carrier by motor vehicle, holding a certificate of public convenience and necessity issued by the Colorado Public Utilities Commission. Ephraim is a private (contract) carrier of property by motor vehicle under a permit issued by the Colorado Public Utilities Commission. Red Ball's complaint, based upon applicable Colorado law, alleges that Ephraim has unlawfully operated as a common carrier of property in competition with Red Ball. Ephraim denies that it has engaged in any unlawful operations, either as a common carrier or as a private carrier. Ephraim interposed a motion to stay all proceedings in the matter until final determination of a case pending before the Colorado Public Utilities Commission, and alleged that the resolution of the issues therein would be determinative in the present case. The motion was denied.

We are confronted with a preliminary question of appellate jurisdiction. It is apparent that the order denying the motion to stay is not a final decision under 28 U.S.C. §1291. Therefore, the order is appealable, if at all, only as an interlocutory order refusing an injunction under 28 U.S.C. §1292(a)(1), which permits appeals from "(i)nterlocutory orders . . . granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions . . . ." It has been made clear in a series of United States Supreme Court decisions that an order staying or refusing to stay proceedings in the United States

District Court is appealable as an interlocutory injunction only if the action in which the order was made is essentially an action at law and the stay was sought to permit the prior determination of some related equitable matter. Baltimore Contractors v. Bodinger, 348 U.S. 176; Morgantown v. Royal Ins. Co., 337 U.S. 254; Ettelson v. Metropolitan Ins. Co., 317 U.S. 188; Shanferoke Co. v. Westchester Co., 293 U.S. 449; Enelow v. New York Life Ins. Co., 293 U.S. 379. See also, Schine v. Schine, 2 Cir., 367 F.2d 685; Travel Consultants, Inc. v. Travel Management Corp., D.C. Cir., 367 F.2d 334; Jackson Brewing Co. v. Clarke, 5 Cir., 303 F.2d 844, cert. denied 371 U.S. 891. This action for injunctive relief, as authorized by applicable Colorado statutes, is essentially equitable in nature, even though in order to obtain complete relief an award of damages is also sought. Equitable injunction includes the power to provide complete relief in light of the statutory purpose. Mitchell v. De Mario Jewelry, 361 U.S. 288; Schine v. Schine, supra. Cf. Kirschner v. West Co., 3 Cir., 300 F.2d 133. Ephraim sought the stay not to permit the prior determination of a related equitable matter, such as a defense or a counterclaim, but rather for the purpose of deferring the action until the determination of an administrative proceeding, involving separate parties, pending before the Colorado Public Utilities Commission, a quasi-judicial, regulatory agency. Such an administrative proceeding is not to be equated with an historical equity action. Allied Air Freight, Inc. v. Pan American World Airways, Inc., 2 Cir., 340 F.2d 160, cert. denied 381 U.S. 924.

APPEAL DISMISSED.